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In the Supreme Court of the United States

October Term, 1948.

KANSAS CITY TERMINAL RAILWAY COMPANY, a Corporation, *Petitioner*,

vs.

FRANK A. THOMPSON, Trustee of and for ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation, and ZONA GRAHAM, Administratrix of the Estate of Thomas Graham, Deceased, *Respondents*.

SEPARATE BRIEF OF RESPONDENT FRANK A. THOMPSON, Trustee of and for St. Louis-San Francisco Railway Company, a Corporation, in opposition to Petition for Writ of Certiorari.

No. 328.

STATEMENT.

Due to the fact that petitioner's statement, appearing in the petition for writ of certiorari, omits certain facts which appear to be material, counsel for respondent, Frank A. Thompson, Trustee St. Louis-San Francisco Railway Company (who will hereafter be referred to as

Frisco), respectfully call the Court's attention to the following:

On page 3 of petitioner's "Statement of the Matters Involved" it is recited that Section 5163, Mo. R. S. A. (the Missouri Lessor-Lessee Statute), provides that a railroad leasing or licensing the use of its tracks shall remain liable for the acts of the lessor or licensor and the lessor or licensor shall likewise be liable for the acts of licensee or lessor. This is an inaccurate statement of the provision of the statute. It provides:

> "Such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road."

The contract, under which the Frisco train involved in the accident was being operated over track 2 of the Terminal was offered in evidence, and relied upon by the plaintiff. Such contract provided that the various railway companies who were parties thereto should have the right and privilege of running and operating passenger trains into the Union Passenger Station at Kansas City, Missouri, over and upon certain railroad tracks of the Terminal Company. It was agreed by the parties that the Frisco train involved in the accident was being operated over track 2 under such agreement at the time of the casualty (Tr. 52). The contract provided:

> "The Terminal Company shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal Facilities and every part thereof and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities."

It was alleged in plaintiff's petition that at the time of his injury the deceased Graham was an employee of the defendant Kansas City Terminal Railway Company and at the time of his injury the Frisco train was being operated over a certain designated track by lease, license or permit granted by the Terminal (Tr. 3-5).

Plaintiff's petition further alleged that the death of the deceased occurred as a result of the negligence of the Terminal's licensee, the Frisco, and

> "That by reason thereof, and by operation of law the defendant Kansas City Terminal Railroad Company is liable to plaintiff for the death of said Thomas Graham, which was negligently caused by its lessees and licensees and their agents, servants and employees as hereinabove set forth" (Tr., p. 8).

The deceased was not in the employ of the Frisco and it had no right of any kind or character to direct and control him or to give any orders or directions to him or to any members of the crew with which he was working on the day of his injury (Tr., p. 78).

At the time of Graham's injury he and his crew were engaged as sole employees of the Terminal in switching freight cars on Terminal tracks 1, 112, 252 and 4730. There was no connection between track 1 and the other tracks above mentioned, which were used by Terminal switch trains exclusively, and track 2 over which it was agreed that the Frisco had a license to operate its passenger trains. Frisco had no license to use track 1 or the other tracks being used by Graham and the other Terminal employees at the time of his fatal injury.

The Supreme Court of Missouri in its opinion ruled and held that the Terminal had admitted on appeal in that court that it had been its theory throughout the case

and in both the trial and the appellate court that Graham was its employee, that both Graham and it were engaged in interstate commerce and that if Frisco was negligent the case was one to be submitted to the jury. The Missouri Supreme Court held that Terminal having committed itself to that theory was bound by it. (*Graham* v. *Thompson*, 212 S. W. (2d) 770, l. c., p. 778.)

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Under the uncontradicted evidence in the case, the deceased, at the time of his fatal injury and death, was not *employed* by the Frisco within the meaning of the Federal Employers' Liability Act and plaintiff was in no event entitled to recover judgment against the Frisco.

Sec. 51, Title 45, U. S. C. A.

Hull v. *Philadelphia Ry. Co.*, 252 U. S. 475, 40 S. Ct. 358.

Robinson v. *Baltimore & Ohio Railway Co.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849.

Chicago, R. I. & Pac. R. R. Co. v. *Bond*, 240 U. S. 449, 36 Sup. Ct. 403.

II.

Section 5163, R. S. A. Mo. 1939, does not have the effect of making the employee of a lessor railroad the employee of the lessee railroad and it has never been so ruled and held by the Supreme Court of Missouri.

Sec. 5163, R. S. A. Mo., 1939.

Clark v. *Atchison, Topeka & S. F. Ry. Co.*, 6 S. W. (2d) 954, 319 Mo. 865.

III.

Terminal was bound by the theory adopted by it in the trial court and in the Supreme Court of Missouri and having conceded that the negligence of the Frisco was imputed to it under the Missouri Lessor-Lessee Statute was estopped from thereafter changing such theory in the appellate court.

Wiener v. *Mutual Life Ins. Co.*, 352 Mo. 673, 179 S. W. (2d) 39.

Knorp v. *Thompson*, 352 Mo. 44, 175 S. W. (2d) 889.

IV.

The opinion of the Supreme Court of Missouri is nowise in conflict with the opinion of this Court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 48, 58 L. Ed. 591, 34 S. Ct. 306.

V.

The rights and liabilities of the parties to this action are governed solely by the terms and provisions of the Federal Employers' Liability Act and all state laws upon the subject were superseded by the Federal Act.

Baltimore & O. R. Co. v. *Kepner*, 314 U. S. 44, 62 S. Ct. 6.

Bailey v. *Central Vermont Ry.*, 391 U. S. 350, 63 S. Ct. 1062.

ARGUMENT.

I.

Under the uncontradicted evidence in the case, the deceased, at the time of his fatal injury and death, was not *employed* by the Frisco within the meaning of the Federal Employers' Liability Act and plaintiff was in no event entitled to recover judgment against the Frisco.

The Federal Employers' Liability Act (Sec. 51, Title 45, U. S. C. A.), by its clear language is applicable only to *employees* of interstate carriers. This Court in *Hull* v. *Philadelphia Railway Co.*, 252 U. S. 475, 40 S. Ct. 358, ruled that the words "employee" and "employed" were used by Congress in the Act in their natural sense and described the conventional relationship of employer and employee and followed its previous ruling in *Robinson* v. *Baltimore & Ohio Railway Co.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849, wherein it was declared:

> "For the 'liability created' by the act is a liability to the 'employees' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the railway company within the meaning of the Act."

In *Chicago, R. I. & Pac. R. R. Co.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, this Court held that the true test to determine whether or not a person performing service for an interstate railroad was an employee of such railroad was whether or not the right existed to control the manner and method in which the work should be done.

The evidence in the case at bar conclusively established that deceased was not in the employ of the Frisco. It had no right of any kind or character to direct and control

him, or to give any orders or directions to him or any members of his crew. The Frisco had no control or right of control over any of the operations, tracks or train movements of Terminal trains, and no license to use or right of control over the tracks being used by the deceased at the time of his death.

Plaintiff in her petition, under which the cause was tried, conceded that at the time of his death Graham was employed by the Terminal. It was not alleged in plaintiff's petition that Graham was an employee of the Frisco or that he became an employee of the Frisco under the Missouri Lessee-Lessor Statute. Plaintiff alleged that by reason of the fact that the Frisco train which struck Graham was being operated over a certain track belonging to the Terminal as a licensee, the Terminal, by operation of law, became liable to the plaintiff for the death of Graham "which was negligently caused by its lessee and licensee" (Tr., p. 8).

It will thus be seen that Graham was clearly not actually employed by the Frisco at the time of his fatal injury, and that it was not even claimed by the plaintiff in her petition that he became such an employee by operation of local Missouri law, but only that Terminal became liable by operation of law for the alleged negligence of the Frisco.

II.

Section 5163, R. S. A. Mo. 1939, does not have the effect of making the employee of a lessor railroad the employee of the lessee railroad and it has never been so ruled and held by the Supreme Court of Missouri.

Terminal's argument in support of its position that the Missouri Lessor-Lessee Statute had the effect of mak-

ing Graham an employee of both the Frisco and the Terminal is based upon a fallacious interpretation of the terms of that Act.

The Supreme Court of Missouri has never ruled or held that the Missouri Act, as a matter of law, makes the employee of the lessor road the employee of the lessee road. The effect of the Missouri decisions, prior to the decision in the case at bar, has been that under the Act the negligence of the lessee road is imputed to the lessor road. The statute specifically provides that the lessor or licensor "shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee." The statute then refers to the obligations and liabilities of the lessee and provides—

> "Such lessee or licensee shall likewise be held liable and may sue and be sued in all cases for the same causes, and in the same manner, *as if operating its own road.*" (Italics ours.)

In the case at bar, the Frisco had no license over track 1 or tracks 112, 252 and 4730 upon which the deceased was working at the time of his injury. Tracks 112, 252 and 4730 were switch or industrial tracks and all led to track 1. There was no connection between track 1, which was used for terminal switch trains exclusively, and track 2. Frisco was not the lessee or licensee of track 1 or the switch tracks above numbered. Under the express language of the Missouri Lessor-Lessee Statute it was provided that Frisco, in its use of track 2, should be held liable for the same causes and in the same manner *as if operating its own road.* Let us assume that Frisco was the owner of track 2, over which it was operating its passenger train by license, what would then have been its liability to Graham, the Terminal employee? Clearly there

could have been no liability under the Federal Act and recovery for the death, insofar as the Frisco was concerned, would be solely governed and controlled by the law of the State of Missouri providing for the recovery of damages for wrongful death. The Missouri Statute, upon its face, clearly shows that it was not the intent or purpose of the Missouri Legislature at the time of the passage of the Act to provide that employees of the lessor road should become, for all purposes, the employee of the lessee road. In the last sentence of the Act it is provided—

> "And for the purposes of jurisdiction and service of process, the servants, agents, employees, officers and offices of either of such corporations or person shall be held to be the agents, servants, employees, officers and offices of both, and service upon the agent, officers or employee of either corporation shall be held and deemed sufficient and valid service upon both of such corporations."

By the use of the foregoing language the Missouri Legislature clearly indicated that the servants, agents and employees of one road should be held to be the agents, servants and employees of either or both *only* for the purposes of jurisdiction and service of process. Surely, if the Legislature had intended to provide that the employees of the lessor road should become the employees of the lessee road, then it would clearly have so stated. The language of the Act negatives any such idea, and, as to the lessee road clearly provides that it shall be liable to all persons as if operating its own road.

It has been the long-established policy of the State of Missouri and of virtually all states in the Union to refuse to permit railroad companies to avoid their charter duties and franchise obligations by leasing their roads, or

by permitting other railroads to operate them. The theory of the Missouri Lessor-Lessee Statute is based upon the premise that the owner of a railroad in Missouri may not escape its charter or franchise obligation to the public by sale or lease of its line of railroad.

In the case of *Clark* v. *Atchison, T. & S. F. Ry. Co.*, 6 S. W. (2d) 954, 319 Mo. 865, the Supreme Court of Missouri recognized this public policy. In its opinion in that case the Supreme Court of Missouri declared (l. c., p. 959, 6 S. W. (2d)):

> "In view of the long-established policy of the state of not permitting railroad companies to avoid their charter duties and responsibilities by leasing their roads or permitting other companies to run trains over them, a legislative intent to relieve to any extent terminal companies from such duties or responsibilities must be made clearly manifest before the courts will be warranted in giving the alleged intent effect."

In the case at bar the franchise obligation was upon the Terminal, and not upon the Frisco. The purpose of the statute was to prevent the Terminal from evading or escaping its franchise obligation to the public by leasing its tracks or licensing the use thereof by other roads. There was thus a definite reason for the legislature to enact a law providing that a lessor road should be and remain liable for the acts of a lessee railroad. Because the lessee railroad had no franchise or charter obligations toward the public, it was only just and reasonable that the Missouri Legislature should provide that it be liable and be subject to suit for the same causes and in the same manner as if operating its own road.

If the Frisco had owned track 2, which closely paralleled track 1 belonging to the Terminal, its liability for

death of one not employed by it would have been under the Missouri Wrongful Death Statute and not under the Federal Act. Its liability for the death of Graham in such case would have been no greater than its liability for the death of any other third person not employed by it, and injured on its tracks through the negligence of its employees. The fact that Graham at the time of his death was employed by another independent railroad company engaged in interstate commerce would in nowise have altered the situation.

Furthermore, the Supreme Court of Missouri, *en banc*, in its opinion in the case at bar, ruled and held that under all of the facts Graham was not an employee of the Frisco under the terms and provisions of the Missouri Lessor-Lessee Statute. The Missouri Supreme Court having interpreted such statute, this Court, under the rule laid down in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, should follow and apply such interpretation.

III.

Terminal was bound by the theory adopted by it in the trial court and in the Supreme Court of Missouri and having conceded that the negligence of the Frisco was imputed to it under the Missouri Lessor-Lessee Statute was estopped from thereafter changing such theory in the appellate court.

The Terminal cannot be heard to complain that the Supreme Court of Missouri erroneously ruled that it was liable for the death of Graham if Frisco was negligent. Graham was its employee and not the employee of the Frisco. Both Terminal and Graham were engaged in interstate commerce for the Terminal and not the Frisco. The Missouri Act specifically provides that the Terminal "shall remain liable for all acts * * * of the lessee or li-

censee." Frisco was its licensee. The Terminal in the trial court and upon appeal in the Supreme Court of Missouri admitted and it was its theory throughout the case that Graham was its employee; that both Graham and it were engaged in interstate commerce and that if Frisco was negligent the case was one to be submitted to the jury. The Terminal having committed itself to that theory was bound by such theory in the Supreme Court under the law of Missouri. See *Wiener* v. *Mutual Life Insurance Co.*, 352 Mo. 673, 179 S. W. (2d) 39; *Knorp* v. *Thompson*, 352 Mo. 44, 175 S. W. (2d) 889.

IV.

The opinion of the Supreme Court of Missouri is nowise in conflict with the opinion of this Court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 48, 58 L. Ed. 591, 34 S. Ct. 306.

That case definitely did not rule than an employee of a lessor railroad automatically became an employee of the lessee railroad, for the purpose of the Federal Act, if, and when injured by the lessee's sole and separate operation. If it be thought that the Zachary case ruled that negligence of a lessee railroad should be imputed to a lessor railroad by force and effect of local law, such ruling does not control the question here presented and is in the converse.

Under the language of the Missouri Lessor-Lessee Statute, and under the theory adopted by the Terminal in the trial and appellate courts, the ruling and holding of the Supreme Court of Missouri that Terminal was liable under the Federal Act, and the Frisco was not liable under such Act, is in nowise inconsistent with or in conflict with any of the controlling decisions of this Court. The Missouri Lessor-Lessee Act does not provide that the em-

ployees of the lessee become the employees of the lessor but provides that the lessor shall be liable for the acts of the lessee. In other words, the Terminal in the case at bar was liable to its employees for the negligent acts of its licensee, the Frisco. The negligence of the Frisco employees became the negligence of the Terminal, not because Frisco employees became Terminal employees, but because the negligence of Frisco employees was imputed to and became the negligence of the terminal.

V.

The rights and liabilities of the parties to this action are governed solely by the terms and provisions of the Federal Employers' Liability Act and all state laws upon the subject were superseded by the Federal Act.

The Supreme Court of Missouri, in its opinion in this case, made an exhaustive review of the federal authorities on above point and correctly ruled and held that the Federal Act may neither be abridged nor enlarged by state statute. Under the Federal Act, which is applicable only to employees of railroads sought to be charged with liability, the terms "employee" and "employed" have heretofore been defined by this Court and the federal courts of appeal.

The Supreme Court of Missouri, under the federal authorities referred to and discussed in the opinion, correctly ruled and held that the deceased could not under the Federal Act become an employee of the Frisco by reason of any terms and provisions of the Missouri Lessor-Lessee Statute.

This Court in *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 62 S. Ct. Rep. 6 (l. c., pp. 9-10), declared, in discussing the Employers' Liability Act, said:

> "It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 114 A. L. R. 1487. Its correct decision depends upon a construction of a federal act. Consequently the action of a state court must be in accord with the federal statute, and the federal rule as to its application rather than state statute, rule or policy."

In *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (l. c., p. 1063), this Court declared:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law."

Absent an actual relationship of employer or employee under the tests laid down by federal law, Graham did not and could not become an employee of the Frisco by reason of the Missouri Lessor-Lessee Statute which was adopted by the Missouri Legislature on March 19, 1907 (Laws of Missouri, 1907), and prior to the adoption of the Federal Act of April 22, 1908.

Conclusion.

WHEREFORE, it is respectfully submitted that petitioner's petition for writ of certiorari should be denied.

M. G. ROBERTS,
E. G. NAHLER,
THOS. E. DEACY,
Counsel for Respondent.

J. L. MILLIGAN,
CLIFFORD B. KIMBERLY,
Of Counsel.